THE LIABILITY OF THE CUSTODIAN OF PUBLIC FUNDS LOST WITHOUT HIS FAULT

IN a work on Public Offices and Officers, the writer characterizes the question of the liability of an officer and his sureties for loss of public funds by the officer without default on his part, as "of great interest and importance, but one upon which the authorities are in conflict."[1] Since the publication of that work in 1890, a considerable number of cases has arisen continuing the conflict, and illustrating its importance. It is proposed in this article, to state the views entertained by the courts, the extent to which they have been applied, the reasons advanced to support the divergent holdings, and to deduce if possible a rule which should govern in these cases.

There are two general doctrines of liability: the one, holding the obligors upon the official bond strictly accountable for any loss or destruction of funds; the other, making default or misconduct of the official a prerequisite to liability, unless a greater responsibility has been assumed unequivocally by contract or imposed expressly by statute.

The first case which announced this strict liability, although not the first case on the subject, is *United States* v. *Prescott*,[2] decided in the January term, 1845. As nearly all the courts which have adopted this rule have based their decisions on the authority of this case, and as it is the leading case in the United States in this controversy, it will be given at length. Prescott was appointed receiver of public moneys at Chicago. He executed with twenty-seven others a penal bond, conditioned that he should truly and faithfully discharge the duties of the office, and should "well, truly and faithfully keep" all moneys collected by him or coming into his hands until ordered to pay over by the proper officer of the government, and should perform all other duties imposed by law. Certain moneys were stolen without negligence on the part of Prescott, and he urged this as a defense to the action by the government for the deficiency. The opinion of the court was given by Mr. Justice McLean. He said:—

"This is not a case of bailment, and, consequently the law of bailment does not apply to it. The liability of the defendant Prescott arises out of his offi-

[1] Mechem on Public Officers, § 297. See also, Van Trees *v.* Territory (1898). 7 Okla. 353; City of Livingston *v.* Woods (1897), 20 Mont. 91.

[2] 3 How. 578, 11 L. ed. 734.

cial bond, and principles which are founded upon public policy. . . . . The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him?

"The objection to this defense is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability contrary to his own express undertaking? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition express or implied, and nothing but the payment of it, when required, can discharge the bond. . . .

"Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to fraud which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish h loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. . . . . . .

"As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond and meet the hazards which he voluntarily incurs."

Only one case was cited in the opinion, *Foster* v. *Essex Bank*,[1] and this was held not to be in point. The court relies on two theories: *first*, that the officer is not a bailee, but that his liability is unconditionally fixed by his bond, and, *secondly*, that a public policy demands the responsibility imposed. The case has been followed by a long line of decisions, which have adopted its ruling, some without any reconsideration, others, even those of the federal courts, have placed their adherence to this liability upon different grounds, or have even repudiated its theories and substituted others in their stead. This is especially true of the federal courts whose policy of decision as respects this question has been vacillating, owing, possibly, to the general and positive language used by Mr. Justice McLean. It may be instructive to review the cases to show the changes in the reasons given to support such an extraordinary accountability. And first of the federal decisions:—

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1 17 Mass. 479.

In the same year, 1845, arose *United States* v. *Freeman*,[1] decided in the circuit court. Money had been advanced to Freeman as disbursing officer of a marine corps, to be used in the Florida war. Freeman deposited the amount in a bank selected by the government to hold its funds. The bank failed and this was urged as a defense. Freeman was adjudged liable and the *Prescott Case* held to be in point, although Woodbury, J., advanced unconsciously another theory developed in later cases. He said:—

"Like the case of all other mere debtors, then, whether public or private, and whether liable on express or implied obligations, it constitutes no defence for the debtors if they have unsafely deposited their money."

This is an expression of the debtor theory[2] to be discussed later.

The next case is *United States* v. *Morgan*,[3] decided in 1850. The action was on a collector's bond and the defense was that the money had been stolen without negligence on the part of the officer. The strict liability was reasserted on the grounds of contract, evidenced by bond and public policy. In regard to the latter, it was said:—

"Anything less than this—any less strict rule in the public administration of finances, would leave everything loose and unsettled, and cause infinite embarrassment in the accounting offices, and numerous losses to the government."

In *United States* v. *Dashiell*, 1866,[4] theft of public funds was accounted no defense on the simple authority of the *Prescott* and *Morgan* cases.

The doctrine was pushed to a great extent in the succeeding case, *United States* v. *Koehler*.[5] Koehler was postmaster at Salem, N. C. In 1862, the confederate government ordered defendant to pay over the money in his hands to one Clemens to whom the federal government owed money for services rendered. No actual compulsion was used. It was held that the bond was not discharged. While some weight was attached to the fact that no compulsion had been used, chief reliance was placed on the *Prescott* case and those subsequent.

The language of the bond in *Boyden* v. *United States*[6] required the officer to "discharge all the duties" of his office. Under an act of congress, it was Boyden's duty to pay money over to the United States when requested. Defendant pleaded to an action by

1 Woodbury & Minot, 45.

2 Mechem, Public Officers, § 300.

3 11 How. 154, 13 L. ed. 643.

4 4 Wall. 182, 18 L. ed. 319.

5 (1869), 9 Wall. 83, 19 L. ed. 574.

6 (1871), 13 Wall. 17, 20 L. ed. 527.

the government for a shortage that he was gagged and violently robbed of the money for which he failed to account, all without any default on his part. This was considered no defense. Previous decisions were affirmed although the opinion was based rather on the bond theory and it was intimated that, in absence of a bond, the law of bailments might apply.

In the same term arose *Bevans* v. *United States*[1] and *Halliburton* v. *United States*.[2] The plea of Bevans was that at the time the money came into his hands as receiver of public funds, Arkansas, which was his district, had seceded and had passed a law commanding that all money owing to the United States should be held, and he further averred that by threats of armed troops he was forced to pay it over. Mr. Justice Strong said that there might be a question as to whether an officer entirely free from fault was not discharged by overpowering force. But by the bond the officer became insurer and the acts of Arkansas were therefore of no consequence. An element which might have changed the opinion was that a breach of the bond had occurred before the ordinance of secession.

Almost the same state of facts obtained in the *Halliburton* case. Defendant alleged that he had had no opportunity to pay the money over and that he was forced to give it up by the Arkansas troops. The same ruling was made, the Chief Justice and Mr. Justice Clifford dissenting in both cases.

According to a Washington judge,[3] the atmosphere surrounding this question cleared to a great extent by *United States* v. *Thomas*,[4] decided in 1872. This was a suit on an official bond for a balance unpaid by Thomas as surveyor of customs in Nashville. The plea was that he was always a loyal citizen, but that he was compelled by rebel authorities to deliver over the moneys in his charge. The opinion of the court was delivered by Mr. Justice Bradley. It was held that Thomas was *not* liable because of the overruling necessity. Said the court:—

"The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully and to the best of his ability. This is the substance of all official oaths. . . . . . This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property."

And further:—

"If in any case a more stringent obligation is desirable it must be prescribed by statute or exacted by exact stipulation." "The basis of the common law rule

[1] (1871), 13 Wall. 56, 20 L. ed. 529.

[2] 13 Wall. 63, 20 L. ed. 533.

[3] Stiles J., in Marx *v.* Parker (1894). 9 Wash. 473.

[4] 15 Wall. 337, 21 L. ed. 89.

is founded on the doctrine of bailment." The public officer was a bailee and though the statute might enlarge his liability, yet, when it merely described duties as, that he should safely keep and turn over moneys when called upon to do so, "it cannot without more, be regarded in any way affecting his responsibility." Description of duties has nothing to do with responsibility. "The common law which is the common reason prescribes that."

It is true, the court proceeded, that the statutes show some anxiety and no light excuse would be allowed, but officers are nevertheless only bailees, bound to the extent of their bonds. The *Prescott* case was called too broad in its application, and it was remarked that the cases did not go to the extent of making the officer liable at all events. Three justices dissented, Mr. Justice Miller denying the whole doctrine of strict liability.

In this judicial utterance by the supreme court, at least one exception was introduced to the rule of rigorous responsibility, and the *Prescott* case and those following were not only doubted because of the broad language used in them, but their reasons were weakened by the new theory of special or extraordinary bailment for which Mr. Justice Bradley contended. This was expressly repudiated when urged by counsel for *Prescott.* To reiterate what was said in his case, "This is not a case of bailment, and, consequently, the law of bailment does not apply." Said Mr. Justice Bradley: "Still they are nothing but bailees. To call them anything else, ... would be an abuse of terms." As to how far the *Thomas* case was meant to go, Mr. Justice Miller, himself, was not sure. So this exceedingly well considered case cannot be said to have cleared the atmosphere very much as respects this question in the federal courts.

This case was applied in *United States* v. *Humason,*[1] tried in the circuit court. The money sued for was lost by the sinking of the ship while the officer in the line of duty was transporting it from San Francisco to Portland. It was considered a good defense on the ground of "overruling necessity." The *Thomas* case was cited and approved.

In *United States* v. *Bosbyshell,*[2] the language of the bond was that the superintendent of the mint "shall faithfully and diligently perform . . . . all the duties of said office according to the laws of the United States." Among those duties was one that the superintendent "shall receive and safely keep" all moneys and bullion coming into his hands. The defendant was held liable for a short-

[1] (1879), 6 Sawyer, 199.

[2] (1896), 73 Fed. (D. C.) 616.

age without his default, the court recurring to the older decisions and distinguishing the *Thomas* case.[1]

Substantially the same language was used in the bond of defendant officer in *United States* v. *Bryan*.[2] The defense was that a subordinate clerk embezzled the funds. The clerk held office under the civil service laws and was convicted of the crime. It was shown that there had been no negligence in the supervision of the subordinate clerk, but the former cases were adopted as decisive.

Another case on this subject in the federal reports is *United States* v. *Zabriskie*, decided in 1898.[3] Suit was brought on the bond of a melter and refiner for money embezzled by a subordinate, not appointed by defendant. The statutes provided that subordinates should also give bond, but the superintendent was not relieved from liability for the acts of his employes. The fact that the embezzler was an independent officer was held no defense because public policy demanded a strict liability and because the bond expressed it.

Recently was received the latest case on the whole subject, *Smythe* v. *United States*,[4] decided in the supreme court, January 26, 1903, which, while it has not changed the conclusions already drawn from all of the decisions in the federal courts, has materially changed views in regard to the *Thomas* case which up to the date of the present decision had presaged a somewhat different outcome to the next judicial consideration of this question by the supreme court. The suit was on the bond of the superintendent of the mint at New Orleans for a shortage. The defense was that the money had been destroyed by fire in the vaults provided by the government. No negligence was charged or found. The bond was conditioned that the officer should "faithfully and diligently perform, execute and discharge all and singular the duties" of his office according to law. The statutes governing the office provided that bond should be given with the named condition, that the officer should render "regular and faithful" accounts, and that the superintendent "shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or expenses of the mint." After reviewing the federal decisions on the subject, the court, speaking through Mr. Justice Harlan, said:—

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1 The case was affirmed, Bosbyshell *v.* United States (1896), 77 Fed. 944, 39 U. S. App. 474.

2 (1897) 82 Fed. (C. C) 290.

3 87 Fed. (C. C.) 714.

4 23 Sup. Ct. Rep. 279, affirming same case, (1901), in 46 C. C. A. 354, 107 Fed. 376.

"We think the government is quite correct in its conclusion that the *Thomas* case does not materially modify the decisions in previous cases. The general rule announced in those cases—and the question need not be discussed anew—is that the obligations of a public officer, who received public moneys under a bond conditioned that he would discharge his duties according to law, and safely keep such moneys as came to his hands, by virtue of his office, are not to be determined by the principles of the law of bailment, but by the special contract evidenced by his bond conditioned as above stated; consequently it is no defense to a suit brought by the government upon such a bond that the moneys which were in the custody of the officer, had been destroyed by fire occurring without his fault or negligence. This rule, so far from being modified by the *Thomas* case, is reaffirmed by it, subject, however, to the exception (which, indeed, some of the prior cases had, in effect, intimated) that it was a valid defense that the failure of the officer to account for public moneys was attributable to overruling necessity or to the public enemy. The case now before us is not embraced by either exception. The result is that the special defense here made cannot, in view of former adjudications, avail the superintendent or his sureties."

As this was the opinion of the entire court, the dissent being not as to the liability, but as to the measure of damages, there is now no doubt as to what is the rule and the reasons therefor in the federal courts. The court virtually adopted the *Prescott* case as a ruling precedent, overlooking any distinction that might have been made by reason of the strict language of the bond and the statutes.

The decisions of the United States courts have been detailed, not only because of their standing, but for the additional reason that they present an epitome of the doctrine of strict liability. Nearly all the defenses to exonerate the officer have been pleaded,—failure of banks, theft, robbery, fire, sinking of ship, compulsion by the enemy—and almost every theory has been used to sustain the doctrine. But the two theories for which the federal courts may be said to stand, are the demands of public policy and the contract expressed by the language of the bond.[1]

In the states and territories where this question has arisen, there is conflict not only in the liabitity to which the officer and his sureties are subjected, but in those in which a strict liability has been adopted, the conflict is carried to the reasons which are made the basis of decision. As will be seen, the great weight of authority, as far as number goes, supports the strict liability. It is interesting, however, to note how the courts arrive at their respective conclusions.

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[1] To obviate this harsh rule of law, several acts have been passed by Congress indemnifying certain officers who have incurred liability without default in the line of their duty.

In Colorado the question was finally settled in *Gartley* v. *People.*[1] Suit was on the bond of a county treasurer who had promised to perform his duties "faithfully and promptly." The defense of bank failure was disregarded and the court took pains to distinguish the *Thomas* case and a previous decision in Colorado from the one before it. But in *Wilson* v. *People*,[2] where the language of the bond was that the officer should "faithfully perform" all the duties of his office and to pay over punctually all moneys coming into his hands, the same defense was sustained. The court held that no statutory provision imposed a greater liability than that at common law, the liability of a bailee. This case was not directly overruled by the later decision, as a distinction was claimed because the funds here deposited were private.

Iowa supports a strict liability on the ground of contract as contained in the bond. If there was any exception to be noted, it could be placed in the contract:—

> "Events which the parties could have provided in the contract shall never be alleged as an excuse for the non-performance of obligations into which they have entered."

So accordingly it was held that accidental fire destroying funds was no defense to a school district treasurer who had promised to fulfill his duties "to the best of ability."[3] On the other hand, a public officer, where funds were stolen, was excused, having promised to exercise "reasonable diligence and care." The court cited the *Prescott* case with approval, but distinguished the language in the bond.[4]

So an officer is liable for theft of funds where the obligation was "faithfully to discharge" the duties of the office and deliver over moneys received by him.[5] After calling attention to the contract it was said:—

> "These rules are applicable to all contracts, and the public interests demand that, at this day, when public funds in such vast amounts are committed to the custody of such an immense number of officers, they should not be relaxed when applied to official bonds. A denial of their application in such cases would serve as an invitation to delinquencies which are already so frequent as to cause alarm."

It was not reasonable "diligence" for a county treasurer to

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1 (1897), 24 Colo. 155, 49 Pac. 272. See also State *v.* Walsen (1892), 17 Colo. 199; McClure *v.* La Plata (1893), 19 Colo. 122.

2 (1893), 19 Colo. 199.

3 District Twp. of Union *v.* Smith (1874), 39 Iowa 39.

4 Rose *v.* Hatch (1857), 5 Iowa 149.

5 District Twp. of Taylor *v.* Morton (1873), 37 Iowa 550.

deposit money in a bank.[1] The court distinguished this case from *Rose* v. *Hatch* where the same language was used. Loss by bank failure implied more default than loss by theft.

In Kentucky the strict rule is based on the ground of public policy.[2]

Mississippi asserts the same liability in two cases,[3] one of them involving peculiar hardship. In *Adams* v. *Lee*, a city tax collector had been willing to pay over money to the proper officer, but he was notified not to do so by the mayor and a majority of the council and finance committee of the city. By their order he deposited the money in a reputable bank, which failed. It was held no defense.

"The better view in our opinion is that public officers are insurers instead of bailees."

This is the rule in Nevada and robbery of funds was disregarded.[4]

It is likewise held in New Jersey that the bond and the statute imposed this hardship upon the officer. The bonds read like those already quoted and the promise of the obligors was held to be that the official fund should be paid "in every event," a construction demanded by public policy.[5]

Probably the best example of the extent to which this rule can logically be carried and the most striking illustration of its extreme harshness is found in *United States* v. *Watts*,[6] a case which arose in the territory of New Mexico. Collins, on whose bond the action was brought, was killed while defending the funds of the United States and afterwards robbed of them, although by his defense and sacrifice of life—if counsel for defendant is correct—he saved to the government several hundred thousand dollars. This, too, was held no defense, on the ground that the bond was "an unconditional contract of insurance against all casualties."

North Carolina follows the majority rule. Robbery did not excuse in an action on the bond of a sheriff;[7] nor failure of a bank.[8] Public policy induced legislators to make officers insurers and their liability absolute.[9]

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1 Lowrey *v.* Polk County (1879), 51 Iowa 50.

2 Commonwealth *v.* Godshaw (1891), 92 Ky. 435.

3 Griffin *v.* Board (1894), 71 Miss. 767, 15 So. 107; Adams *v.* Lee (1894), 72 Miss. 281, 16 So. 243.

4 State *v.* Nevin (1885), 19 Nev. 162.

5 New Providence *v.* McEachron (1869), 33 N. J. L. 339; McEachron *v.* New Providence (1871), 35 N. J. L. 528.

6 (1873) 1 N. M. 553. See also, Maloy *v.* Bernalillo County (1900), — N. M. —, 52 L. R. A. 126. There is an exception recognized in United States *v.* Swan (1896), 8 N. M. 401.

7 State *v.* Clarke (1875), 73 N. C. 255.

8 Havens *v.* Lathene (1876), 75 N. C. 505.

9 State *v.* Blair (1877), 76 N. C. 78.

So in Ohio it is said:—

"By accepting the office, the treasurer assumes upon himself the duty of receiving and faithfully keeping the public money and of paying it out according to law. His bond is a contract that he will not fail upon any account to do those acts. It is in effect an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands."[1]

In Texas this is the rule on no very firm grounds.[2] So in Wisconsin it was held that an officer is not absolved by the failure of a bank,[3] and the reasoning of the *Prescott* case was adopted.

The language in *Commonwealth* v. *Comly*,[4] expresses the view of Pennsylvania:—

"The opinion of the court in the case of the *United States* v. *Prescott*, is founded in sound policy and sound law. The responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement when there is none, but by the condition of his bond. The condition of it in this instance was, to 'account for and pay over' the moneys to be received. . . . . . The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretences, delinquencies, which are fearfully frequent already, would be incessant."[5]

The same rule has been adopted in Washington.[6]

It is believed that these cases rest their holding upon the results deducible from the United States rule, namely, on the bond and public policy theories. It is true that some of the cases reviewed put more stress on one or the other and that they are distinct reasons, either of which has been *called* sufficient, but the theories are not to be found separately.[7] The two generally[8] appear together or another theory is mixed with them.[9]

There is another main theory which several courts have adopted as conclusive upon this question of liability and which has been

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1 State *v.* Harper (1856), 6 Ohio St. 607,

2 Boggs *v.* State (1876), 46 Tex. 10. Also, McKinney *v.* Robinson (1892), 84 Tex. 489.

3 Supervisors *v.* Kaime (1876), 39 Wis. 468.

4 (1846) 3 Pa. St. 372.

5 See also, Bailey *v.* Commonwealth (1887), 20 W. N. C. 221; Nason *v.* Directors (1889), 126 Pa. St. 445.

6 Fairchild *v.* Hedges (1896), 14 Wash. 117, 31 L. R. A. 851.

7 See State *v.* Gramm, (1897), 7 Wyo. 362.

8 There appears to be one case where the liability is rested solely on the bond. "His liability is fixed by his bond and no parting with the money, or loss . . . . will release him from his obligation to make payment. . . . . The duty is to pay over . . . . and his bond is the contract that he will not fail upon any account to do this act." State *v.* Gatzweiler (1871), 49 Mo. 17.

9 See a criticism of Mr. Mechem's distinctions in the dissenting opinion of Roberts *v.* Commissioners (1898), 8 Wyo. 177.

applied to create a strict accountability. It is, that the statutes governing the officer and prescribing his duties are so worded that any other conclusion would be inconsistent with a proper interpretation of the written law. This appears to be the reason in Kansas,[1] and in several decisions in Illinois. So in *Thompson* v. *Trustees*,[2] the statute in respect to township treasurers required them to keep two special books, to charge themselves with money coming in and to note all moneys going out, to demand, receive and "safely keep" according to law and to "deliver to his successor in office all moneys." To a defense that the money was stolen, the court answered:—

"Township treasurers, under our statute . . . . are made insurers of the funds coming to their possession, and nothing should or can excuse them but the act of God or of the public enemy."

This was approved in *Swift* v. *Trustees*,[3] and affirmed the next year.[4] The latest case in Illinois has changed the ground somewhat in a manner to be noticed later.[5]

It is also the rule in Minnesota. The statute was held to create absolute liability,[6] but did not make the officer debtor,[7] and the same liability rested upon the public officer even in absence of bond.[8]

This is the controlling principle in Nebraska.[9] The position is stated thus:—

"When the statutes impose the duty of payment it is sufficient, if the bond is conditioned for the faithful discharge of the duties of the officer, to render the sureties liable, to the same extent as their principal." And the responsibility is absolute, "when the law, in positive terms or from its general tenor and without any limitation upon the obligation, requires that the officer pay over public funds which have been received by him and held as such." [10]

In an elaborately considered opinion, the court in Oklahoma

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1 Rose *v.* Douglas Twp. (1893), 52 Kans. 451.

2 (1863), 30 Ill. 99.

3 (1900), 91 Ill. App. 221.

4 Swift *v.* Trustees (1901), 189 Ill. 584, 60 N. E. 44.

5 Estate of Ramsey *v.* People (1902), 197 Ill. 572, 64 N. E. 549.

6 Board of Education *v.* Jewell (1890), 44 Minn. 427.

7 Commissioners *v.* Jones (1872), 18 Minn. 199; Northern Pac. R. Co. *v.* Owens (1902), — Minn. —, 57 L. R. A. 634. See also, City of Redwood *v.* Tower (1881), 28 Minn. 45.

8 County Commissioners *v.* Gilbert (1872), 19 Minn. 214.

9 Ward *v.* School District (1880), 10 Neb. 293.

10 Bush *v.* Johnson County (1896), 49 Neb. 1. See also, Thomssen *v.* Hall County (1902), — Neb. —, 89 N. W. 389. In this case there might be said to have been default in not following the depository law.

holds the same.[1] The officer was bound by statute to discharge "faithfully and promptly" the duties of his office, to "deliver to his successor" moneys belonging to the office, to pay forfeit in case he loaned any public money, and to be held guilty of crime against the territory if he should "fail to pay over any part [of the fund] at any time when required by law so to do." Said the court:—

"According to these plain statutory provisions, the liability of a county treasurer is absolute, and cannot be changed or modified upon the plea that the public funds have been lost or stolen without any fault or negligence on his part. . . . . These various statutory provisions were undoubtedly intended by the legislature to hold the treasurer of public funds in this territory to a strict accountability."

Then there is another line of cases which holds that a public officer, by virtue of the statutes which prescribe his duties, becomes a debtor to the state and, therefore, any loss by him cannot affect his liability to pay his debt. Of these is *Estate of Ramsey* v. *People*,[2] 1902, where the supreme court of Illinois said:—

"By force of the statute governing the subject, the warden becomes in effect the debtor of the public. His liability being absolute and like that of other debtors, he is not relieved from liability, even though he is so unfortunate as to lose money deposited by him in a bank which he supposes to be solvent, but which turns out to be insolvent. In other words, he is not a mere bailee, and therefore, cannot call upon the public to bear the loss." The statute in the case required of the penitentiary warden to "render . . . . . a full and accurate statement of all moneys received by him and all sums of money expended by him," and also that the officer must give bond conditioned "for the faithful performance" of his duties.

This has been held in one case in Massachusetts. The provision was that the treasurer "shall faithfully account for and pay over, and with diligence and fidelity, act etc." It was decided that such language made the officer debtor and accountant.[3]

The sum of the holdings in Indiana seems to recognize this principle.[4]

Michigan adheres to this rule in a very ably reasoned case.[5] Mr. Justice Campbell thus expressed it:—

"There is no law authorizing anyone but the treasurer to handle, or to intermeddle with the funds, but only to investigate the accounts. If he

[1] Van Trees *v.* Territory (1898), 7 Okla. 353.

[2] 197 Ill. 572, 64 N. E. 549, affirming, Estate of Ramsey *v.* People (1901), 97 Ill. App. 283.

[3] Inhabitants of Hancock *v.* Hazzard (1853), 12 Cushing 112.

[4] Allen *v.* State (1842), 6 Blackf. 252; Halbert *v.* State (1864), 22 Ind. 125; Morbeck *v.* State (1867), 28 Ind. 86; Rock *v.* Stinger (1871), 36 Ind. 346; Inglis *v.* State (1872), 61 Ind. 212; Mount *v.* State (1883), 90 Ind. 29; Rowley *v.* Fair (1885), 104 Ind. 189.

[5] Perley *v.* Muskegon (1875), 32 Mich. 132.

accounts fairly, and meets all obligations as presented, there can usually be no occasion to inquire further. . . . . . In regard to county funds the treasurers are responsible as debtors, and in case of vacancy the moneys belonging to the treasury are not to be taken possession of specifically, but are to be delivered over on oath by the previous officer, if alive, and in case of his death, by his personal representatives. . . . . . It can only be on the theory that the treasurer is a debtor, at all events, for the money received by him. . . . . . Accordingly his liability is absolute, and not affected by unavoidable loss or accident, which, in case of bailments, could not fail to release him, without injustice."

In New York there are several decisions which follow this reasoning.[1]

Perhaps one other view should be noted, that of Missouri at the present, which is to the effect that a bailment exists, but not such as is understood in the ordinary sense of the term, but a special bailment imposing special obligations upon the officer, from which no loss or accident can excuse him, with the possible exception of the act of God or of the public enemy, and upon these points there is no ruling.[2]

These, then, are the authorities and their views in respect to strict liability.[3]

"As has been indicated, the courts of this country are by no means in accord upon this proposition. The courts of last resort in a few of the states have refused to accede to the idea that there exists any rational distinction between the measure of responsibility of an officer with public funds, and one having private moneys in his control, or any bonded trustee upon whom is the duty of keeping money belonging to others. The existence of a public policy forbidding any relaxation of the condition of a bond given by the public official, when there has been no sort of negligence or fraud on his part, is strenuously controverted by such courts, as well, especially in more recent cases, by a respectable number of dissenting judges."[4]

This well states the general stand of these courts and it is intended to examine the authorities sustaining this proposition.

The first case decided in the United States upon the whole question, *Supervisors* v. *Dorr*,[5] 1841, went to uphold this doctrine. This was a suit upon the official bond of a county treasurer conditioned that he would "faithfully execute" the duties of his office

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1 Tillinghast *v.* Merrill (1896), 151 N. Y. 135; Muzzy *v.* Shattuck (1845), 1 Denio, 233; City of Johnstown *v.* Rogers (1897), 20 Misc. R. 262.

2 State *v.* Powell (1878), 67 Mo. 395; State *v.* Moore (1881), 74 Mo. 413.

3 See generally, Mechem, Public Officers, §§ 298, 299, 300, and a note of Mr. Murfree in 21 Cent. Law Journal, 313.

4 State *v.* Gramm (1897), 7 Wyo. 327.

5 25 Wend. 440.

according to law. Theft of the money was interposed as defense. It was held that in order to subject the officer to liability, it was necessary to prove *misconduct* or *neglect* in the execution of his duties. After stating the rule at the common law, Nelson, C.J., said:—

"The condition of the bond recognizes this common law rule. It is that the treasurer 'shall faithfully execute the duties of the said office'—'and shall pay according to law all moneys,' etc. The first clause is general and prescribes the fidelity with which the officer is to perform all the several duties belonging to the office; the residue is but an enumeration of some of the most important."

This case was affirmed [1] by a divided court, Chancellor Walworth delivering an opinion in favor of sustaining the decision.[2] So in *People* v. *Faulkner*,[3] it was observed that whatever public policy existed when the *Prescott* case was decided, the reason for it had disappeared with the progress of the times and the advance of science.

In Alabama robbery of funds was called a good defense, where the bond was conditioned that the tax collector should faithfully keep the public money.[4] It was held that the bond did not change the liability and that the statute simply raised the degree of care to the highest, "such as a very prudent man exercises in respect to the most important matters."

California is among those states that do not approve of the strict doctrine.[5] The bond in the case cited was that defendant should "well and faithfully perform" all of the duties of his office. The statute defining the duties of the treasurer was that he should immediately deposit all money coming to him in his official capacity, not to make any profit therefrom and "to receive and safely keep all moneys which shall come into his hands as treasurer." After reviewing the various decisions, the court said:—

"We therefore conclude that the obligation resting upon Mulligan, as treasurer of the city of Healdsburg, was simply that which the common law imposes upon him as a bailee for hire; that the provisions of the statute to keep safely and pay over the money received by him in his official capacity, were duties which would have rested upon him as such bailee in the absence of these provisions of the statute, and did not enlarge his responsibility or

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1 (1844), 7 Hill, 583,

2 See also, Browning *v.* Hanford (1843), 5 Hill, 588.

3 (1887), 107 N. Y. 477 But this is probably not now the rule in New York in view of the decision in Tillinghast *v.* Merrill, 151 N. Y. 135.

4 State *v.* Houston (1885), 78 Ala. 576. See also, Alston *v.* State (1890), 92 Ala. 124.

5 City of Healdsburg *v.* Mulligan (1896), 113 Cal. 205, 45 Pac. 337.

that of his sureties; and that if he were violently robbed of the moneys of the city in his possession, it is a defense to the action."

In Colorado it was held that no strict liability existed when the language of the bond was that the officer "should faithfully perform all the duties" of the office. And it was further decided that the statute could impose a more stringent liability, but that it had not, by the language used; that the officer was still a bailee, and that the bond did not extend the obligation, but its office was to *secure* faithful and prompt performance of duties.[1]

Rose v. *Hatch*,[2] an Iowa case, adopted the *Prescott* case, but held that the words in a bond, "to pay over promptly" justified a more lenient interpretation and allowed the defense made.

The leading case defending this holding is *Cumberland County* v. *Pennell*, decided in Maine, in 1879[3]. The language in the bond of the officer was that he should "well and faithfully attend to the duties" of his office and "perform all things required by said office." The court, in the most strongly reasoned opinion upon this subject, after reviewing and classifying the decisions, adhered to the common law rule of making misconduct or negligence a condition to liability. Said the court:—

"Our conclusion therefore is, that the treasurer's degree of responsibility was simply that which the common law imposed upon him as a bailee for hire; that the statutes of this state did not extend or enlarge it; that his official bond does not increase his responsibility, but simply affords security for the performance of his legal obligation; that if, without fault or negligence on his part, the county treasurer is violently robbed of money belonging to the county, it is a valid defense, *pro tanto*, to an action upon his official bond."

In Montana the case[4] which followed the *Prescott* case was overruled by the subsequent decision in *City of Livingston* v. *Woods*.[5] The court in that case said:—

"In accordance with the best reason and recent authorities on the subject, we are constrained to hold that the facts pleaded afford a good and sufficient defense. With Mechem we concede that the majority of the cases are the other way, but, like him, we think the view we have taken 'more consonant with reason and justice.'"

Likewise in South Carolina, where a county treasurer bound

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1 Wilson *v.* People (1893), 19 Colo., 199. Also, dissenting opinion in Gartley *v.* People (1897), 24 Colo. 166.

2 (1857), 5 Iowa, 149.

3 69 Me. 357.

4 Jefferson County *v.* Lineberger (1878), 3 Mont. 231.

5 (1897), 20 Mont. 91.

himself that his "duties shall be well and truly performed," no statute covering the case, it was held that the failure of a bank in which the county money had been deposited furnished a defense.[1] The common law was held to obtain.

In Tennessee no distinction was made, in a court of equity, in the measure of fiduciary responsibility, whether it arose from public or private relations.[2] It was not an imprudent act to deposit county money in a bank which failed and the treasurer was absolved from liability.[3] The bond, in the latter case, was conditioned faithfully to collect and pay over all taxes. The court held that such language was not sufficient to make the officer liable at all hazards, and that the bond did not create the liability—the law did that—but was merely to superadd the security of bondsmen to the responsibility of the officer.

Two very late cases in Wyoming were decided upon similar grounds. In the first[4] of these, the wording of the bond was for the officer "faithfully to discharge" the duties of his office, and the statute provided that he should "truly and justly account for all money" and deliver all funds and balances to his successor. Failure of the bank in which the money had been deposited, proved to be a good defense. After an exhaustive and discriminating review of the cases, the court construed the language of the bond and of the statute to mean—

> "That he should exercise a diligent and prudent care over the money, but in a high degree, and should also bring to the performance of such a duty strict fidelity and faithfulness."
>
> "But to authorize the application of the strict rule the obligation must be certain, positive and clear, and made by the direct terms of the bond, or statute read in connection with it."

The other case was practically the same on the facts and the ruling.[5]

With the exception of several dissenting opinions,[6] these are all the judicial utterances in the United States in favor of a limited

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1 York County *v.* Watson (1881), 15 S. C. 1.

2 Governor *v.* McEwen (1844), 5 Humph. 265. Also Peck *v.* James (1859), 3 Head, 75.

3 State *v.* Copeland (1896), 96 Tenn. 296.

4 State *v.* Gramm (1898), 7 Wyo. 329.

5 Roberts *v.* Commissioners (1899), 8 Wyo. 177.

6 For example in Fairchild *v.* Hedges, 14 Wash. 117; United States *v.* Smythe, 46 C. C. A. 354; United States *v.* Thomas, 15 Wall. 337; Gartley *v.* People, 24 Colo. 155; and others. It is but fair to state that there are several dissenting opinions to be found in the more lenient line of decisions.

liability. England, however, is claimed to be on this side of the controversy. In *Lane* v. *Cotton*,[1] it was held that a public officer whose office was established by statute was a bailee. And Lord Hardwicke absolved a receiver from liability when he had lost official funds without default.[2] This is the opinion also of Lord Mansfield.[3] In *Walker* v. *British Guarantee Association*[4] it is said:—

> "The treasurer of a Benefit Building Society within statutes . . . . having covenanted with the society's trustees that he will faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, and punctually to account to the trustees for all and every sum and sums of money . . . which he . . . shall receive on the society's account, and being bound by the rules of the society to pay over in a given time the same moneys which he shall reserve, does not violate such obligations if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence and without fault of his own, such obligation being that only of a bailee."

These cases are more or less in point as showing how public officers are regarded in England, namely as bailees; and, as Lord Campbell, C. J., said in the *Walker* case:—

> "If James, the principal, was guilty of no default, the defendants as his sureties cannot be liable."

To sum up, then, there are two lines of authority. The first holds an officer strictly liable, and consequently the sureties on his bond, on the theories that the officer is a debtor by force of the bond or statute, or both, or that he is bound by the unconditional bond into which he has voluntarily entered, or that public policy demands such responsibility, or that the statute by its general terms creates the liability of insurer. A number of decisions have invented a special species of bailment which does not recognize loss, however incurred. The exceptions that have been generally recognized to the rule are losses occasioned by the act of God, or of the public enemies. In none of the cases has either the bond or the statute imposed liability, at all events in express terms. Of the states and territories which follow this conclusion upon one or more theories are the United States, Colorado, Iowa, Kentucky, Mississippi, Nevada, New Jersey, New York, New Mexico, North Carolina, Ohio, Texas, Wisconsin, Pennsylvania, Washington,

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1 1 Ld. Raymond, (1701) 646.

2 Knight *v.* Lord Plimouth (1747), 3 Atk. Ch. 480.

3 Whitfield *v.* Le Despencer (1778), 2 Cowper, 754.

4 (1852), 18 Ad. & E. (N. S.) (83 E. C. L.) 276.

Kansas, Illinois, Minnesota, Nebraska, Oklahoma, Massachusetts, Michigan and Missouri.

The second holds that the officer is a bailee, bound to a high degree of care — some go as far as saying the highest degree of care which a very prudent man would use in the most important affairs— but in absence of express terms in statutes to impose additional liability, or an express undertaking in the bond to assume such liability, the officer and his sureties are not liable where money has been lost without the default, misconduct, or negligence of the custodian. A respectable minority uphold this view. Of the states in favor of this principle are: Alabama, Colorado,[1] California, Maine, Montana, South Carolina, Tennessee, and Wyoming, as also England.[2]

The purpose of extended citation and copious extracts from opinions is obvious. In order to know what a rule of law ought to be, when the choice of several is given, it is necessary to know what these several rules are. It is further essential, if an intelligent choice is to be made, to know these rules clearly, the reasons upon which they rest, and what is the law that supports them. This has been attempted impartially, and in the remaining pages it is proposed to examine the reasons in order to test their validity.

As to Public Policy.—It will be remembered, that the *Prescott* case first laid down as a controlling principle of decision, a public policy, because frauds might be practiced with impunity, since a public depositary had only to lay his plans and arrange his proofs. To any more lenient rule it was objected that it would present too much temptation.

> "Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense." [3]

Without entering into any inquiry as to the precise nature of public policy, it will be conceded that if it operates as law at all, it ought not to be a vague thing to be applied when definite law cannot be found to cover the case. Public policy is not so indeterminate. It must be predicated on positive law. It must look to a breach of the law as it is, not as it ought to be.[4]

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[1] The case upholding this doctrine has not been overruled, but was carefully distinguished.

[2] In New York the rule is still doubtful. Louisiana belongs very likely to this class. See State *v.* Laurier (1879), 31 La. Ann. 423.

[3] United States *v.* Prescott, 3 How. 578.

[4] Vidal *v.* Girard's Ex'rs., 2 How. 127, p. 197; United States *v.* Freight Association, 58 Fed. 58, p. 69.

Said Sanborn, C. J., in the *Trans-Missouri Freight Association Case*, speaking of public policy:—

"In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws, and judicial decisions."

It is therefore a pertinent question to ask where Mr. Justice McLean found this public policy? He does not cite a single decision in its favor, no reference is given to any section of the statutes, nor to any article of the constitution. On the other hand, the common law rule is conceded to have been different; the main decision prior to the *Prescott* case was *Supervisors* v. *Dorr*,[1] which held an opposite view and where, though the bond was almost identical, Chief Justice Nelson and the judges who concurred with him, discovered no public policy; and, if a Maine case[2] is to be trusted, Mr. Justice Story held different views several years before in a similar case. It is the absence of all definite authority which has earned this public policy the description of "new-born." So the court in *Cumberland* v. *Pennell* observed:—

"We do not conceive it to be our duty to make an imaginary public policy, never until recently recognized by any court, the cause for creating a new obligation by judicial legislation."

This was the opinion of Mr. Justice Miller, in the *Thomas* case. He said:—

"Nor do I believe that prior to these decisions [the federal cases] there was any principle of public policy recognized by the courts, or imposed by the law, which made a depositary of the public money liable for it, when it had been lost or destroyed without any fault of negligence or fraud on his part."

The courts that have followed this decision have not discovered any such concrete authority, but have largely been satisfied with the citation of the opinion in which this public policy was first announced. It is therefore apparent that this line of cases must stand or fall with the *Prescott* case, unless new conditions have arisen, or additional valid reasons have been given.

Have such new conditions arisen as would make imperative this public policy? This has been answered in the negative by a New York court. In *People* v. *Faulkner*,[3] Earl, J., said:—

"At the time when that decision was made, in January, 1845, when there were no telegraph lines, and but few railroads in the country, public policy

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[1] 25 Wend. 440. [2] Cumberland *v.* Pennell, 69 Me. 357. [3] 107 N. Y. 477.

may have required from public officers the rigid responsibility thereby imposed. Most of the custodians and receivers of the public moneys lived at distant points from the central government, where it was difficult to supervise their acts or control their conduct, or check and uncover their frauds. . . Now, in the changed conditions of our country, with newspapers, telegraphs and railroads everywhere . . . it can scarcely be said that, as to federal officers, public policy now requires the enforcement of the rigid rule of responsibility imposed by the earlier decisions." [1]

But aside from authority, what of the reasons which courts have adduced to show why such policy *ought* to exist? Are they sufficient? Upon examination they will be found to be these: That official delinquencies would be very frequent if the rule were otherwise; that they would be difficult to prove; that the defenses themselves are shallow pretenses;[2] that public officers are not watched as are private trustees; and that great sums of money would be jeopardized by any more lenient rule.[3]

As answer to the reason that the peculations would be very frequent, it is but necessary to cite some actual cases, where such a lenient rule has been tried, to see how often these delinquencies arise. This is practical investigation, which should outweigh any theoretical fears that have been entertained in this regard. Take, for example, the state of New York, with its army of public officers and vast amounts of revenue. The court that established a strict liability in 1896,[4] used this language:—

"It therefore comes to this, that for forty-five years the case of *Supervisor's* v. *Dorr* (25 Wend. 440), has stood without being directly overruled by any case in this state, and the rule of the limited liability of the common law approved therein by four of our most distinguished judges."

In New York, after 1841, but three cases have come before the court involving the question,—not such a great number of delinquencies in forty-five years. So in Maine, where this lax liability is approved, no "fearful" peculations seem to have occurred. Says the court in *Cumberland* v. *Pennell* (1879), already cited:—

"On the contrary, this is the first case in this state in which the 'shallow pretense' of robbery, without fault on his part, has been interposed by a treasurer in an action upon his official bond; ever since the decision of *Potter*

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[1] Statutes which have been passed relaxing strict liability would have a tendency to show a different public policy in regard to those officers named in the acts. See People *v.* Faulkner, 107 N. Y. 477; State *v.* Gramm, 7 Wyo. 329,

[2] Commonwealth *v.* Comly, 3 Pa. St. 372.

[3] Tillinghast *v.* Merrill, 151 N. Y. 135,

[4] Tillinghast *v.* Merrill, 151 N. Y. 135.

v. *Titcomb* [1831], 7 Maine, 302, the people of this state have entertained a different view from that promulgated for the first time in *United States* v. *Prescott*, as to the effect of an official bond stipulating for a 'faithful discharge' of official duties."

And it may be added that, since the "first case" in 1879, over twenty-three years have elapsed without an attempt, in Maine, to make use of this defense to cover official misconduct.

In Tennessee where a liberal doctrine was announced as early as 1844,[1] only one other case [2] has arisen on this point, and that one in 1896, a period of fifty-two years and none since then. It is needless to say that *practically*, delinquencies have not proved to be so frequent as to arouse fears.

The difficulty of proof has led some courts to adopt this doctrine of strict liability and has often been put forward as a reason for such public policy. A reason like this seems strange when coming from a court. Granting that it may become difficult to prove default when funds have been lost, yet the difficulty is not inherent in this state of facts alone, but comes up in many situations and yet the court would not say that when a state of facts is difficult to prove, it will deny justice. A great part of the judicial machinery has been erected for this very purpose, of finding what the facts are. It is an unwarranted confession of weakness in the court, of inadequacy in the system, to deny what all concede to be justice, because there *might* arise cases where the officer could outwit the court. "But," says Haynes C., in *City of Healdsburg* v. *Mulligan*,[3] "we cannot assume that courts of justice are unable to protect the public in such cases." Justice is not a matter of convenience to be given when not difficult to do so. Moreover, this reason is not carried to other litigation where the difficulty is as great.[4] In the case of guardians, private trustees, executors and the like, who might simulate loss or "pretend" larcenies or robberies with as great ease as public officers, no such reason has been invoked. It is a partial application of law resting on no firm basis of distinction.[5]

The remaining reasons may be treated more briefly. The defenses put forward, such as robbery, theft, fire and others, have been

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[1] Governor *v.* McEwen, 5 Humph. 265.

[2] State *v.* Copeland, 96 Tenn. 296,

[3] 113 Cal. 205, 45 Pac. 337.

[4] See, as to crimes, the argument of Mr. James C. Carter in Smyth *v.* Ames, 169 U. S 466, at p. 509.

[5] York County *v.* Watson, 15 S. C. 1.

termed "shallow pretenses" entitled to no consideration.[1] To make such serious pleas into "shallow pretenses" and to have this apparently as a reason for invoking a strict liability, is a proposition that has received vigorous denial,[2] but need not be controverted.

It is further urged by some courts that public officials are not and cannot be watched as are private trustees and therefore public policy demands a strict liability to make up the deficiency or inability of supervision.[3] The public officer must, as a rule, account to some person or board: the private trustee, the executor, etc., need do no more. Generally private trustees are obligated to account to some court, which should have no higher consideration as a supervisory board or body than the person or body which overlooks the duties of the officer. But it is said that no such interest is manifested in the accounts of public officers as is displayed by persons who have relations with private trustees. That may well be doubted. The public officer is watched not only by the limited circle which may be affected by his misconduct, but because he *is* public, he is watched by his party, by his opponents, by the newspapers which exercise a known and practical power in this respect, and he is watched by his constituents. These forces have more power and means of investigation than have the few who supervise a private trustee, and they exercise it as often.

The court in the *Prescott* case puts the query as to how much loss might be anticipated if the common law rule were applied to "our postmasters, collectors of the customs," etc., and this has been asked generally by courts which follow this decision. It changes the presumption of innocence in favor of men, to one of guilt as soon as a person has been elected to a public office which controls funds. Public confidence means judicial suspicion. And this is a conclusive presumption since no loss can excuse. To a similar suspicion, Judge Redfield[4] answered:—

"If we hold the sheriff and other officers liable in the case of property attached on *mesne* process, only for ordinary care and diligence, such as other bailees for pay are required to exercise, we place the liability upon a reasonable basis, whereas the rigorous accountability imposed upon certain classes of bailees, on account of some *supposed facility* or *temptation*, which they

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1 Commonwealth *v.* Comly, 3 Pa. St. 372; Fairchild *v.* Hedges, 14 Wash. 117; or "frivolous" in U. S. *v.* Morgan, 11 How. 154.

2 Cumberland *v.* Pennell, 69 Me. 370.

3 Cf. People *v.* Faulkner, 107 N. Y. 477.

4 Bridges *v.* Perry, 24 Vt. 262.

have been said to possess, for collusive rescues or robberies, *is not founded upon any just warrant, either of sound judgment or constant experience.*"

That this change of character is not a fact, may not be able to be established by extended citation of authority, but as was said by James, L. J.:—

"The clearer a thing is the more difficult it is to find any express authority or any dictum exactly to the point."[1]

Finally it is said that great sums of money are at the disposal of such officers and these would be jeopardized if it were not for this policy. It is known that private trustees of all kinds, executors, administrators, guardians, committees of incompetent persons, and receivers control in any one state vastly more money and property than do public officers. Statistics are not necessary to show this. And such private custodians are generally appointed by some court and not by the persons immediately interested as are the people who have direct choice.

"The argument that the honest and faithful agent must be mulcted when loss occurs without his fault, lest some fraud might occur and fail of detection, was not sufficient to overcome and crush the natural sense of justice where private rights are involved, and yet the private funds passing through the hands of fiduciary agents are vastly greater in amount than the public funds."[2]

These are the authority and the reasons upon which the public policy rests, but there are several other theories advanced to sustain a strict liability and they must be accorded some consideration.

As to the Effect of the Statutes.—It is conceded by all who support a more lenient view that the legislature can pass statutes requiring strict accountability. So a court adhering to this rule, said:—

"Of course, the legislature may at will, by general statute, change this rule of responsibility of public officers, as it can, within certain well-known constitutional limits, any other rule of the common law. The office being created by the statute, it may be subjected to any reasonable conditions by the statute."[3]

But it is not admitted that statutes which prescribe general duties of an office and say nothing about the responsibility or its extent, which merely call upon the officer faithfully to discharge his duty, imply a rigorous accountability.[4]

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[1] (1875) L. R. 10 Ch. 526.

[2] Mr. Lacey in Roberts *v.* Commissioners, 8 Wyo. 191.

[3] Cumberland *v.* Pennell, 69 Me. 357. See also Perley *v.* Muskegon, 32 Mich. 132.

[4] Mechem, Public Officers, § 301.

There was nothing at common law which distinguished the public treasurer from any other financial manager or trustee [1] and these were held only to the liability of bailees,[2] obligated only to exercise good faith and reasonable diligence and not responsible for loss without default.[3] The requirement of the common law was that the officer should faithfully, honestly, prudently, and diligently perform the duties of his office. These duties in case of financial managers were to keep safely, to account truly, and to pay over the moneys according to law.[4] To become liable as for breach of such duties, it was necessary to prove some official negligence, default or misconduct.[5] This is also the general language and nature of official oaths.[6]

It will therefore be profitable to look at the language of some of the statutes which are said to impose a strict liability. In Oklahoma the words:—

> "Shall faithfully and promptly perform the duties of his office, ... shall pay according to law all moneys . . . . shall deliver over to his successor . . . . all moneys" and that he shall be liable to a fine if he "shall fail to pay over any part thereof at any time when required by law"

were held to import strict liability and to change the common law.[7] So when it was provided that the officer should take an oath faithfully and diligently "to perform his duties," to give bond conditioned for the "faithful and diligent" performance of those duties, that the officer should "keep and render . . . . regular and faithful accounts" of his transactions with other officers and that he should "receive and safely keep, until legally withdrawn, all moneys" for the use of the mint,—the strict liability was held to exist.[8] So in Missouri the officer was strictly responsible when the statute made it his duty to "deliver to his successor all money."[9]

Some have additional terms,[10] some have but few commands, but not in one case was there a statute that prescribed *in terms* a strict

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1 State *v.* Gramm, 7 Wyo. 329, 40 L. R. A. 695; United States *v.* Thomas, 15 Wall. 337, 21 L. ed. 89.

2 State *v.* Meagher, 44 Mo. 359.

3 See Story, Bailments, §§ 620, 621.

4 See generally, United States *v.* Thomas, 15 Wall. 337.

5 State *v.* Copeland, 96 Tenn. 296.

6 United States *v.* Thomas, 15 Wall. 337; Mechem, Public Officers, § 256.

7 Van Trees *v.* Oklahoma, 7 Okla. 353.

8 Smythe *v.* United States, Supreme Court, Jan. 26, 1903, 23 Sup. Ct. Rep. 279.

9 State *v.* Moore, 74 Mo. 413.

10 Thomssen *v.* Hall County, — Neb. —, 89 N. W. 389.

liability. This would be very easy for a legislature to do, especially in view of this conflict of authority. Words such as "at all events" or of similar import would have settled the matter.[1]

It is well established that:—

"Statutes in subordination to their terms are to be construed agreeably to the rules of the common law."[2]

And when a statute may be interpreted less harshly, it is the duty of the court to do so.[3] A recent text-writer upon the subject of statutory construction, has said:—

"It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required. . . . The best construction of a statute is to construe it as near to the rule and reason of the common law as may be. . . . . In all doubtful matters, and when the statute is in general terms, it is subject to the principles of the common law; it is to receive such a construction as is agreeable to that law in cases of the same nature. A statute in affirmance of a rule of the common law will be construed as to its consequences, in accordance with such law."[4]

If the language of the statutes and the language of the common law principle be compared, it will become at once apparent that the various legislative enactments have merely attempted to define the duties of the officer, not to lay down any rule of responsibility. If they have merely prescribed the duties, then, according to proper rules of construction, the liability of the common law ought to control, and that was the liability of bailees. This has been stated by Mr. Justice Bradley:[5]—

"Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and pay it over when called upon to do so by the proper authority, it cannot, without more be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the non-performance of them, or a discharge from their obligation. The common law which is the common reason prescribes that."

The statutes may be generally said to provide,—(*a*) for the faithful performance of the official duties; (*b*) for an oath faithfully to

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1 This seems to have been done in Colorado where the constitution of that state, in regard to the state treasurer provided that "the treasurer and his sureties shall *in all cases* be held responsible" for the safe-keeping of the public fund. See Gartley *v.* People, 24 Colo. 155, 49 Pac. 272.

2 United States *v.* Thomas, 15 Wall. 337.

3 State *v.* Gramm, 7 Wyo. 329.

4 Sutherland on Statutory Construction, §§ 290, 291.

5 United States *v.* Thomas, 15 Wall. 337.

perform such duties; (*c*) to become bound in a bond conditioned for the faithful and prompt performance; (*d*) to receive and keep safely all moneys coming into the hands of the officer; (*e*) to give just and faithful accounts of his receipts and expenditures as officer; (*f*) to deliver over to the successor all moneys and property coming into the officer's custody. These provisions will not all be found in all the statutes, but they are substantially the provisions that have been used as showing a strict responsibility. In some measure duties have been added, but the common law demanded the same obligations.

At the common law, these duties, expressed in similar words, did not imply a strict responsibility,[1] and upon what principle of construction can they be said to have another meaning when placed in the statutes? It is argued that when found in the statutes, certain implications arise from these words. This must be predicated upon an idea that there is a difference in the effect of statute law and common law, that one is *more* law than the other, a fallacy refuted by its own terms. To quote the language of a court that minutely considered this question:—

"We are unable to give our consent to reading into the statute the very words or language or provision omitted therefrom, which will render applicable, and the only thing which will render applicable, the harsh rule, which is not found elsewhere, respecting depositaries of money."[2]

And to conclude the objection, in words from the same court:—

"To authorize the application of the strict rule, the obligation must be certain, positive, and clear, and made express by the direct terms of the bond or statute read in connection with it."[3]

These reasons would apply to the theory that the statutes make the officer debtor, but some additional objection may be urged to this holding. The courts that have called the officer debtor, have, with the exception of the case in Michigan and one or two of the earlier decisions of the Indiana courts,[4] not been consistent in the application of the doctrine. They have not allowed the debtor to use the money which he is said to owe. In a later case in Indiana, a merely technical title was allowed the officer, the court adding that:—

"The money . . . . really belongs to the township."[5]

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[1] State *v*, Houston, 78 Ala. 576.

[2] State *v*. Gramm, 7 Wyo. 329.

[3] See also, United States *v*. Thomas. 15 Wall. 337.

[4] Perley *v*. Muskegon, 32 Mich. 132.

[5] Rowley *v*. Fair, 104 Ind. 189.

In North Carolina he is debtor, but must not touch the fund which he owes.[1] In Illinois he is made "custodian" of the money and called debtor, but is nowhere given power to use it.[2] In none of the statutes can be found language which changes the purpose for which the officer is elected. A public financial agent is merely custodian of the money to discharge certain duties with it. He does not stand in a business relation to the public that selects him or the government which employs him, but in an official relation. A tax collector, for instance, could not be said to own the tax money.[3] They are merely bailees and when, as it often occurs, the officer is expressly or impliedly forbidden to use the money, to call him a debtor is "an abuse of terms."[4]

Whatever power the legislature may have thus to change the character of a public depositary to a debtor, would need to be clearly expressed and unqualifiedly declared. It should not be inferred, because it is not denied. Such a doctrine would tend to abuse of office[5] and delay of the government which would be tied up in the financial operations of *debtors* to whom the money is thus turned over. It would tend to create a personal interest in the fund, rather than in the office,making the officer not only the agent of the state, but also a principal and adverse party.

As to the bond:[6]—Many cases have rested their conclusion of strict liability upon the fact that the bond of the officer is a contract, unconditional in terms and therefore no condition is to be implied. To discuss this theory, the nature and object of official bonds should be found. It may be here stated that the language in the bonds of executors, administrators, guardians and the like, imports similar obligations,[7] but the responsibility is only that of bailees.

Public officers are generally required to give bonds "to secure the faithful and proper discharge of their duties." [8] So it is said in *Potter* v. *Titcomb*:—[9]

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[1] Havens *v.* Lathene, 75 N. C. 505.

[2] Estate of Ramsey *v.* People, 197 Ill, 572.

[3] State *v.* Houston, 78 Ala. 576.

[4] United States *v.* Thomas, 15 Wall. 337.

[5] City of Livingston *v.* Woods, 20 Mont. 91.

[6] In regard to the language of the bond to "keep faithfully," etc., the observations in respect to the language of the statute would apply.

[7] 11 Am. and Eng. Enc. of Law, (2nd ed.) 869.

[8] Mechem, Public Officers, § 263.

[9] 7 Me. 302.

"The design of all official bonds is to secure from losses those who are or may be, interested in the faithful discharge of the duties mentioned in them. Such bonds are given to protect against damage occasioned by unfaithfulness, negligence, or dishonesty in such officers."

The main object of the bond is to superadd responsible sureties as a further guard against unfaithfulness.[1] In none of the cases cited does the bond go beyond an *outline* of the duties. The extent of the responsibility must be looked for in the law; it is fixed by statute.[2] So Mr. Justice Miller aptly remarks:—

"I do not believe now that on sound principle this bond should be construed to extend the obligations of the depositary beyond what the law imposes on him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver, if no bond had been given; the object of taking the bond being to obtain sureities for the performance of that obligation."[3]

The primary object, then, is to secure the common law duties, or the statutory duties of the officer, by providing a forfeit in case of default. If the bond were such a contract as it is claimed to be, we should often have the spectacle of a public officer's being compelled to give bond, going beyond his duties by law. This may, of course, be made a condition, where the office is a legislative one, and it is true that the officer may assume in express terms a more severe responsibility:—[4]

"But it seems more reasonable to construe all the statutes together, and to make the bond the measure of official liability, instead of making it an independent contract."[5]

It is a collateral undertaking, incident upon duties prescribed by law, and the duty secured by such bond does not become a debt until default is made on the part of the principal.[6] And it can be no part of the judicial prerogative, to impose a duty upon the officer which he has not promised to perform, and which the law has not required of him,—to keep safely *without exception*.[7] And in absence of express language, either by the statute or in the bond, the officer ought not to be held at all events.

[1] State *v.* Copeland, 96 Tenn. 296.

[2] State *v.* Copeland. 96 Tenn. 296.

[3] 15 Wal 353.

[4] Mechem, Public Officers, § 301.

[5] Perley *v.* Muskegon, 32 Mich. 132.

[6] United States *v.* Thomas, 15 Wall, 351.

[7] State *v.* Gramm, 7 Wyo. 329.

These are the objections to a rule which has universally been admitted to be harsh and illiberal. It is nevertheless a liability imposed, when there was no authoritative or reasonable public policy, when the statute did not in terms demand it, and when it was not the office of the bond to require it. There is respectable authority for another view which rests on firmer principles of justice and of law, and in later decisions a marked tendency toward this more lenient view may be observed.[1] The rigorous rule makes the sureties not answerable alone for the honesty, fidelity and uprightness, of the officer, whom they know and can trust, but makes them answerable, as was stated by counsel in the *Prescott* case, "against the cunning, dishonesty and villany of all mankind," and further, against circumstances and accidents for which no prudence or diligence can invent a guard. Such a course may deter responsible men from becoming sureties, and honest men from accepting official positions, since for an insufficient compensation they are made insurers. True, the people should be protected, but justice does not require that a liability be imposed on an officer which has neither been declared by law nor assumed by him.[2] And while the bailor's rights should be protected, the bailee should not be sacrificed.[3]

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[1] Cases in, Montana (1897), in Wyoming (1898, 1899), in Tennessee (1896), and California (1896).

[2] City of Healdsburg *v.* Mulligan, 113 Cal, 205.

[3] York County *v.* Watson, 15 S. C. 1.